

principle, a litigant is prevented from using self-contradiction as a means of obtaining unfair advantage.⁷⁶ In the administrative context, the doctrine has been utilized to forbid litigants from reversing position, without justification, within a single proceeding.⁷⁷

It is this doctrine proscribing unjustified reversals in a single proceeding - a close relation to judicial estoppel - which was recognized by the FCC in *Beaufort County Broadcasting Co.*⁷⁸ In that case, the Commission refused to grant an application for a new Class C FM radio station in Port Royal, South Carolina submitted by a comparative broadcast applicant. The applicant had argued before the ALJ that Port Royal did not need a Class C FM station and that the facility was more appropriately licensed to neighboring Beaufort. But after an initial decision rejected his position, the applicant reversed course and sought to amend its application to propose service to Port Royal.⁷⁹ In an opinion upheld by the Commission and the Court of Appeals, the Review Board found that the Commission "need not play such 'games with applicants'"⁸⁰ who offer an "inconsistent and opportunistic" change in position during the course of Commission litigation.⁸¹

⁷⁶ *Id.* at 134-62.

⁷⁷ *Id.* at 134-63 & n.10 (citing *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed.Cir. 1996)).

⁷⁸ 94 FCC 2d 572, 575 (Rev. Bd. 1983), *review denied*, FCC 84-824 (June 19, 1984), *aff'd sub nom.*, *Beaufort County Broadcasting Co. v. FCC*, 787 F.2d 645 (D.C. Cir. 1986) ("*Beaufort County*"). In other contexts, the Commission has also made clear that it will not countenance participants in its proceedings who deal in self-contradiction. For example, the Commission has noted in the policy area that it "discourages parties from making contradictory arguments in different proceedings. If a party makes contradictory arguments across different Commission proceedings, and these contradictions are brought to the Commission's attention, the Commission will weigh that party's behavior when considering its arguments." *MCI Telecommunications Corp.*, 12 FCC Rcd 15351, 15438 n.327 (1997).

⁷⁹ *Id.* at 573.

⁸⁰ *Id.* at 575.

⁸¹ *Id.* at 575. In doing so, the Board upheld a ruling by the ALJ that relied on "estoppel or preclusion because of Beaufort's inconsistent position or opportunistic reversal of theory during litigation." *Id.* at 574. (citing 1B Moore, *Federal Practice*, at 765 et seq. (2d Ed. 1971) and *Allen*

Instead, the Review Board precluded the applicant's proposed "major amendment" to change the city it proposed to serve, which would have rendered its "proposed argument . . . inconsistent with its [prior] argument."⁸² The Commission subsequently awarded the license to a competing applicant who had consistently maintained the need for a Class C FM service in Port Royal.⁸³

Similarly, in the course of the Commission's comparative hearings for the award of broadcast licenses, unsuccessful applicants have attempted to "upgrade" their applications before the Commission's Review Board.⁸⁴ In essence, such applicants would reverse representations made in initial applications in order to avoid comparative demerits or to mirror the representations of the prevailing applicant. Recognizing the opportunity for gamesmanship presented by such upgrades, the Commission consistently proscribed "prejudicial post-cutoff date comparative upgrading" in the interest of "preserv[ing] the fairness of the hearing."⁸⁵

The essence of each of these cases is simple and elemental: participants in Commission adjudications are expected to maintain consistent positions throughout the course of litigation. The Commission has the right to expect no less – particularly from one of its own Bureaus. Having consistently reached one set of conclusions after its thorough analysis of *all* of the evidence and the relevant case law, the Bureau should not now be heard to advance entirely contrary conclusions based on the same facts and law. Such procedural meandering offers no valid support for the conclusions reached in the ID and should not be countenanced by this

v. *Zurich Insurance Co.*, 667 F.2d 1162, 1166-68 (4th Cir. 1982).

⁸² *Id.* at 575.

⁸³ *Id.* at 576-77.

⁸⁴ *See, e.g., Sarasota-Charlotte Broadcasting Corp.*, 5 FCC Rcd 3837 (1990); *N.E.O. Broadcasting Co.*, 103 FCC 2d 1031 (1986); *LeFlore-Dixie, Inc.*, 100 FCC 2d 331 (1985); *Midwest Broadcasting Co.*, 70 FCC 2d 1489 (1979).

⁸⁵ *LeFlore-Dixie, Inc.*, 100 FCC 2d at 334 (citations omitted).

agency

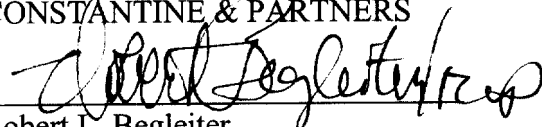
IV. CONCLUSION

For all the foregoing reasons, the Bureau's Reply, by reversing position without explanation or support, has greatly undermined the Bureau's credibility. Therefore, consistent with *Beaufort County*, the Reply should be given no weight by the Commission in its deliberations and should be stricken from the record in this proceeding.

Respectfully submitted,

CONSTANTINE & PARTNERS

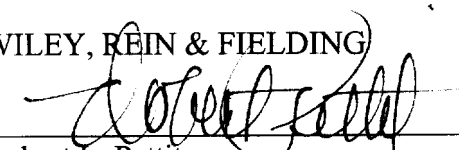
By:


Robert L. Begleiter
Yang Chen
477 Madison Avenue
New York, New York 10022
(212) 350-2700

and

WILEY, REIN & FIELDING

By:


Robert L. Pettit
Peter D. Shields
Bryan N. Tramont
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Attorneys for Bartholdi Cable
Company, Inc.

July 24, 1998

APPENDIX 1

WHEN LIBERTY KNEW

5/29/97

11/10/97

Bureau's Comments on Liberty's Opposition to Motion for Inquiry	Bureau's Proposed Findings of Facts and Conclusions of Law	Bureau's Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law of Time Warner and Liberty	Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony	Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report	Bureau's Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Consolidated Reply
Feb. 21, 1997	Feb. 28, 1997	March 10, 1997	June 11, 1997	June 23, 1997	Nov. 19, 1997	Dec. 2, 1997	April 22, 1998
<p>[I]n late April 1995, Liberty's Chairman, Howard Milstein, became aware that Liberty was providing service...utilizing microwave paths that had pending, but not yet granted, applications before the FCC." (5)</p>	<p>"No one in Liberty's senior management was aware of, encouraged, or condoned the provision of premature service" (9)</p>	<p>"[T]he fact that Lloyd Constantine in September 1995 disclosed to the Commission in a sworn affidavit that Liberty learned of the illegal operations in late April 1995, shows that the Liberty witnesses would have had no reason to intentionally misrepresent about when they learned of the unauthorized provision of service." (9);</p> <p>"[B]ecause these documents confirm and corroborate the date that Lloyd Constantine ... gave in his September 20, 1995 affidavit of when Liberty first discovered its mistakes, it is apparent that Liberty was not trying to conceal these two documents." (18)</p>	<p>"[T]here is absolutely no record evidence that Liberty or its counsel were aware of unauthorized operation of microwave paths by Liberty prior to April 1995." (7);</p> <p>"...Liberty had no reason to learn from the March 1993 license inventory that any paths were being operated without a license." (7-8);</p> <p>"Based on the facts, there is no evidence that anyone at Liberty, or Liberty's counsel knew of premature activations prior to April 1995." (11-12);</p> <p>"The record evidence that Liberty did not learn about illegal activation of microwave paths until April 1995 remains unaltered." (15)</p>	<p>"[A]ll the record evidence still establishes that Liberty did not know about any premature activations until April 1995..." (4);</p> <p>"The facts in this proceeding establish that Mr. Nourain, in fact, did not know which paths were authorized." (4);</p> <p>"[T]he inventories did not provide Mr. Nourain with information regarding unauthorized activations..." (4-5);</p> <p>"[N]othing in the record demonstrated that Liberty was aware of any unauthorized transmissions of microwave service prior to April 1995..." (9)</p>	<p>"The record evidence further established that Liberty's President, Peter Price, learned of the violations around the last week of April 1995." (6);</p> <p>"The facts are consistent with the information provided in the Audit Report ... 'Mr. Nourain does not state that he specifically informed Mr. Price or other senior management that service was being instituted ... without FCC authorization.'" (6-7);</p> <p>"There is nothing in the Audit Report which suggests that Liberty's owners ... or president ... had any knowledge of the premature authorization of service prior to April 1995. To the contrary, the Audit Report provides further support that these individuals did <i>not</i> know ..." (14)</p>	<p>"[T]he facts in the record in no way demonstrate that Mr. Nourain, or anyone else at Liberty, was aware of the unauthorized activations when they occurred." (4);</p> <p>"The record in this proceeding, including the Audit Report, establishes that no Liberty principal was aware of unauthorized provision of microwave service prior to April 1995." (9)</p>	<p>"Liberty must have known of the violations prior to the date to which it testified." (i);</p> <p>"...Liberty must have been aware of the violations prior to the time that Liberty alleges it learned of them." (7);</p> <p>"The Bureau believes that the Presiding Judge reasonably inferred that the person at Liberty in charge of the decision of when to activate must have known of Mr. Nourain's haphazard activations." (16);</p> <p>"[T]he Bureau believes there is a well founded basis for the Presiding Judge's determination that Liberty's principals knew of premature activations..." (16)</p>

(Testimony Closed)

(Record Closed)

JOINT MOTION

5/29/97

11/10/97

Bureau's Comments Liberty's Opposition to Motion Inquiry	Bureau's Proposed Findings of Facts and Conclusions of Law	Bureau's Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law of Time Warner and Liberty	Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony	Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report	Bureau's Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Consolidated Reply
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	<p>"It [the Bureau] still supports the tenets of the Joint Motion, where it states that it does not believe Liberty intentionally turned on the paths without Commission approval." (iv);</p> <p>"Accordingly, the Bureau remains in support of the motion and urges its adoption." (14);</p> <p>"[T]he Bureau does not believe that the discovery of these additional violations requires a denial of the Joint Motion ..." (40)</p> <p>"[T]he Bureau requests the Presiding Judge to grant the Joint Motion By Bartholdi Cable Co., Inc., and Wireless Telecommunications Bureau for Summary Decision." (51)</p>	<p>"Although the Bureau is very troubled and puzzled by the deviations in testimony [of Liberty employees and attorneys at the candor hearing], we do not believe that it necessitates a departure from the position taken by the Bureau in the Joint Motion [for Summary Decision]." (13);</p> <p>"[T]he Bureau again states that the changes in the testimony do not rise to a level for the Bureau to abandon its position in the Joint Motion." (17);</p> <p>"[T]he Bureau does not believe that the facts warrant a denial of the Joint Motion for Summary Decision. To the contrary ... the evidence adduced at the candor hearing supports adoption of the Joint Motion." (21)</p>	<p>"[T]he Bureau has no stake in the outcome of this proceeding ... Therefore, although the Bureau has joined Liberty in the Joint Motion ... if new evidence demonstrated that the basis for the Joint Motion was unfounded, then the public interest would dictate that the Bureau withdraw its support ... [T]he Bureau maintained its position in favor of summary disposition in this proceeding." (14-15);</p> <p>"The record evidence that Liberty did not learn about illegal activation of microwave paths until April 1995 remains unaltered. Also unaltered is the evidence in the Joint Motion as to how and why such violations occurred. For that reason, the Bureau remains in support of the Joint Motion." (15)</p>		<p>"Furthermore, the Bureau believes that the Audit Report does not and should not provide any basis for denying the pending Joint Motion." (i);</p> <p>"The Audit Report supports the principal conclusions set forth in the Joint Motion." (11-12);</p> <p>"The additional evidence contained in, or apparent discrepancies created by, the Audit Report, do not raise any new issues of material fact that require denial of the Joint Motion." (12);</p> <p>"[B]ecause the Audit Report confirms the fact that Liberty's principals and officers were unaware of any violations until April 1995, the relief requested in the Joint Motion is appropriate." (14)</p>	<p>"[The] Wireless Telecommunications Bureau [] respectfully requests that the Joint Motion for Summary Decision be granted." (10)</p>	<p>"[B]ecause the Bureau's support of Liberty's position in the Joint Motion has noticeably declined since the filing of the Joint Motion, the Bureau filed neither exceptions to, nor a brief in support of, the I.D. With this Consolidated Reply, the Bureau withdraws our support of the Joint Motion." (6)</p>

(Testimony Closed)

(Record Closed)

INTERNAL AUDIT REPORT

5/29/97

11/10/97

Bureau's Comments on Liberty's Opposition to Motion for Inquiry	Bureau's Proposed Findings of Facts and Conclusions of Law	Bureau's Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law of Time Warner and Liberty	Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony	Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report	Bureau's Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Consolidated Reply
Feb. 21, 1997	Feb. 28, 1997	March 10, 1997	June 11, 1997	June 23, 1997	Nov. 19, 1997	Dec. 2, 1997	April 22, 1998
	<p>"[T]he Bureau submits that the record developed in this proceeding, even in the absence of the internal audit report (Report), is sufficient for the Presiding Judge to render his decision on the pending Joint Motion" (41);</p> <p>"The Report is not the sole source of the information contained therein, and as such, the information itself is, and has been, available through other avenues." (47)</p>	<p>"[T]he Bureau repeats its position ... that the Report is nothing but the documentation of the facts and circumstances surrounding the violations, and not the only source of those same facts." (iv);</p> <p>"...Liberty ... did not ... withhold responses to questions during these proceedings which may have touched upon information which may be contained in the Report ... [I]t is difficult for the Bureau to understand how Time Warner and Cablevision can believe that a gap still exists ... a gap which can be filled only by some additional piece(s) of evidence which may be contained in the Report." (11-12)</p>			<p>"The Bureau has considered the information presented in the Audit Report that was prepared on behalf of Liberty. Based on a thorough analysis, the Bureau believes that the Audit Report substantially comports with the evidence previously developed in this proceeding. Furthermore, the Bureau believes that the Audit Report does not and should not provide any basis for denying the pending Joint Motion ..." (i)</p>	<p>"The Audit report is Not Decisionally Significant" (2);</p> <p>"The Audit Report Does Not Shed any Light on whether Liberty Made Material Misrepresentations to the Commission" (6)</p>	<p>"[T]he Presiding Judge's observation that the report 'was strategically withheld under a waived assertion of the attorney-client privilege' and that Liberty's raising of untimely legal arguments 'succeeded in keeping the Audit Report from this proceeding until the very end when it was too late to use it as a discovery tool' are indeed accurate statements." (9);</p> <p>"[T]he Presiding Judge relied on and utilized the Report and information contained therein for precisely what it is - the most credible and reliable evidence that explained the events which led to the designated issues." (9)</p>

(Testimony Closed)

(Record Closed)

DISQUALIFICATION

5/29/97

11/10/97

Bureau's Comments in Liberty's Opposition to Motion for Inquiry	Bureau's Proposed Findings of Facts and Conclusions of Law	Bureau's Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law of Time Warner and Liberty	Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony	Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report	Bureau's Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Consolidated Reply
Feb. 21, 1997	Feb. 28, 1997	March 10, 1997	June 11, 1997	June 23, 1997	Nov. 19, 1997	Dec. 2, 1997	April 22, 1998
	<p>"[T]he Bureau believes that Liberty should not be disqualified as a licensee." (iv);</p> <p>"[T]he Joint Motion asserts that the facts show those actions [the violations] do not justify a finding that Liberty is not qualified to be granted the licenses that are at issue in this proceeding." (10);</p> <p>"Liberty is qualified to remain a Commission licensee." (36);</p> <p>"To disqualify Liberty from being a licensee upon character grounds for its actions that do not represent untruthfulness or unreliability would be counter to the <i>Policy Statement</i>." (37)</p>	<p>"The Bureau agrees that Liberty can be relied upon to comply with the Commission's Rules due to its promise to maintain an internal compliance procedure." (v);</p> <p>"[N]othing in the Commission's <i>Character and Policy Statement</i> requires the pending applications to be denied." (vi);</p> <p>"[T]he Bureau reaffirms its position stated in the Joint Motion against denial of applications." (6-7);</p> <p>"[T]he Bureau does not agree that denial of the applications is the only remedy." (8);</p> <p>"[T]he Bureau believes that Liberty can be trusted to ... comply with the Commission's Rules ... because of [Liberty's] compliance program." (16)</p>	<p>"The violations committed by Liberty do not rise to the level of violations to be considered 'so wanton, gross, and callous, and in total disregard of [Liberty's] obligations to the Commission, as to be equivalent to an affirmative and deliberate intent' and therefore disqualifying." (12-13);</p> <p>"At the conclusion of the initial round of discovery in this proceeding, the Bureau believed that the record evidence showed that while Liberty had committed serious violations of the Rules, there was nothing in the record which required that Liberty be found unqualified as a licensee. Nothing that has developed in this proceeding since then has changed that position of the Bureau." (14)</p>	<p>"Therefore, Liberty can be trusted as a compliant licensee in the future." (12)</p>	<p>"As set forth fully in the <i>Joint Motion</i>, as well as in other Bureau pleadings, the violations committed under these particular circumstances do not justify a finding that Liberty is unqualified to be a licensee." (12)</p>	<p>"[T]he addition of these new facts...does not support disqualification of Liberty." (2)</p>	<p>"[T]he [ID] ... properly concluded that [Liberty] ... should be denied the captioned fifteen applications." (i);</p> <p>"[T]he <i>I.D.</i> properly found that Liberty lacked the requisite character qualifications to receive ... Commission licenses." (i);</p> <p>"[T]he preponderance of the record evidence establishes that Liberty does not possess the qualifications to be a Commission licensee." (21)</p>

(Testimony Closed)

(Record Closed)

FORFEITURE

5/29/97

11/10/97

Bureau's Comments Liberty's Position to Motion Inquiry	Bureau's Proposed Findings of Facts and Conclusions of Law	Bureau's Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law of Time Warner and Liberty	Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony	Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report	Bureau's Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Consolidated Reply
Oct. 21, 1997	Feb. 28, 1997	March 10, 1997	June 11, 1997	June 23, 1997	Nov. 19, 1997	Dec. 2, 1997	April 22, 1998
	<p>"[T]he Bureau requests that a forfeiture in the amount of \$20,000 per violation, for a total of \$300,000 be assessed against Liberty in addition to the forfeiture amount sought in the Joint Motion." (iv);</p> <p>"Accordingly, the Bureau requests that a forfeiture be assessed against Liberty, in addition to the \$790,000 already requested in the Joint Motion, in the amount of \$20,000 per violation for a total of \$300,000." (40-41)</p>	<p>"[T]he Bureau does not agree with Time Warner and Cablevision that this infraction requires a finding of misrepresentation and application dismissal. Instead, based on the record as a whole, and taking into account how the admitted unauthorized activations occurred and remedial steps taken by Liberty to ensure that future unauthorized activations do not occur, a monetary forfeiture is the proper sanction." (10);</p> <p>"[I]n reliance upon [Liberty's] promise of future compliance, the Bureau agrees that the proper sanction is a stiff monetary forfeiture." (16)</p>	<p>"Liberty has consistently admitted that it had unknowingly violated the Rules by activating microwave paths without proper authorization. As the Commission stated in <i>David A. Bayer</i>, where the record does not show that management or owners 'intended to violate the rules or to further any unlawful scheme,' the proper sanction is 'a forfeiture rather than revocation.'" (12)</p>	<p>"[T]he Bureau maintains that a forfeiture, albeit a substantial one, is the appropriate remedy for Liberty's violations. The Bureau has asked for, and Liberty has consented to, forfeitures totaling \$1,090,000." (12)</p>	<p>"[T]he appropriate remedy is for Liberty to pay a substantial forfeiture for its repeated violations. The Bureau recommended that a severe penalty in the amount of \$1,090,000 is an appropriate forfeiture in this matter. The Bureau believes that the additional violations revealed in the Audit Report may warrant an increase in the forfeiture amount assessed against Liberty." (12)</p>		<p>"The Bureau ... properly denied the Joint Motion ... which sought to resolve the designated issues with a substantial forfeiture." (i)</p>

(Testimony Closed)

(Record Closed)

FLAGRANT DISREGARD

5/29/97

11/10/97

Bureau's Comments on Liberty's Opposition to Motion for Inquiry	Bureau's Proposed Findings of Facts and Conclusions of Law	Bureau's Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law of Time Warner and Liberty	Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony	Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report	Bureau's Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Consolidated Reply
Feb. 21, 1997	Feb. 28, 1997	March 10, 1997	June 11, 1997	June 23, 1997	Nov. 19, 1997	Dec. 2, 1997	April 22, 1998
	<p>"No one in Liberty's senior management was aware of, encouraged, or condoned the provision of premature service. Once it realized the extent of its unauthorized service, Liberty came forward and informed the Commission of this in detail." (9);</p> <p>"We do not believe that the violations, although willful and repeated, amount to a flagrant disregard of the Commission's Rules." (36-37);</p> <p>"Liberty can be trusted to fully comply with the Commission's rules in the future." (37)</p>	<p>"On balance, the Bureau is persuaded that the principals did not set out to disregard the Commission's Rules. As the Milsteins pointed out, their other businesses are heavily regulated. Their actions in setting up a rigorous compliance program after they discovered their mistakes verify their lack of intent." (17);</p> <p>"Although there were 19 premature activations, and Liberty did not inform the Bureau of its violations when it filed its STA requests on May 4, 1995, this does not reflect a flagrant disregard for the Commission's Rules and policies. Rather, it reflects, <i>inter alia</i>, repeated carelessness and lack of necessary communication within their organization." (20)</p>	<p>"The violations committed by Liberty do not rise to the level of violations to be considered 'so wanton, gross, and callous, and in total disregard of [Liberty's] obligations to the Commission, as to be equivalent to an affirmative and deliberate intent' and therefore disqualifying." (12-13);</p> <p>"These problems, although severe and sanctionable, cannot be considered to be 'wanton, gross, and callous.'" (13)</p>	<p>"The issue is therefore, whether Liberty's numerous violations rise to the level of meeting the <i>Golden Broadcasting</i> threshold of being in total disregard of our Rules. Although the Bureau believes this is a close call, we still believe the answer is that the violations did not reach that level." (10);</p> <p>"[B]ased on the evidence, Liberty's violations should not be considered wanton, gross, and callous. While certainly serious and inexcusable, the violations did not occur because Liberty possesses a total disregard for the Commission processes ... The Milsteins hired Mr. Price, whom they obviously believed to be an expert manager. Unfortunately for them, he was not." (11)</p>	<p>"The record evidence indicated that Liberty established a compliance program which was developed by one of its law firms, to insure that there would be no further non-compliance with applicable rules, laws and regulations." (8)</p>		<p>"The Bureau agrees with the <i>I.D.</i>'s conclusion that Liberty recklessly disregarded the Commission's rules and regulatory procedures, and that such misconduct could not have been the result of mere inadvertence." (7);</p> <p>"[T]he Bureau supports the Presiding Judge's inference that '[s]uch evidence establishes that Mr. Price was willfully and recklessly failing to utilize available information that would readily detect premature activations as early as April 1993.'" (16);</p> <p>"The record is replete with evidence that Liberty repeatedly and willfully ignored its regulatory obligations." (17)</p>

(Testimony Closed)

(Record Closed)

MISREPRESENTATION / INTENT TO DECEIVE

5/29/97

11/10/97

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Feb. 21, 1997	Feb. 28, 1997	March 10, 1997	June 11, 1997	June 23, 1997	Nov. 19, 1997	Dec. 2, 1997	April 22, 1998
<p>"[T]he Bureau has every reason to believe that Liberty will be reliable in the future, in following the Commission's Rules and policies." (iv);</p> <p>"No one in Liberty's senior management was aware of, encouraged, or condoned the provision of premature service. Once it realized the extent of its unauthorized service, Liberty came forward and informed the Commission of this in detail." (9);</p> <p>"Liberty had no reason to misrepresent facts..." (35);</p>	<p>"Because the Bureau does not believe that Liberty's principals had the requisite intent to mislead the Commission ... the Bureau cannot agree ... that Liberty's license applications should be denied." (iv);</p> <p>"The Bureau does not agree ... that the degree of inconsistency in the testimony demonstrates ... Liberty's intention to corrupt the instant proceeding." (4);</p> <p>"[Liberty's principal's] actions in setting up a rigorous compliance program after they discovered their mistakes verify their lack of intent." (17);</p> <p>"...Liberty's actions 'fall short of the degree of <i>scienter</i> historically required by the Commission for disqualifying.'" (20)</p>	<p>"[T]here is nothing to support that Mr. Nourain had the intention of misrepresenting facts to the Commission in his affidavits." (14)</p>	<p>"Liberty's violations do not involve Liberty's failure to report required information to the Commission, but instead, Liberty's actions of activating OFS paths prior to obtaining authorization. Accordingly, the issue does not overtly involve any misrepresentations on Liberty's part." (11)</p>	<p>"An 'essential element' of misrepresentation is an 'intent to deceive.' Without any intent upon Liberty to convey false information, the Commission cannot find that Liberty has made any material misrepresentation..." (6-7);</p> <p>"[T]he Commission cannot find that Liberty made any material misrepresentation." (7);</p> <p>"[T]he Bureau does not support a finding that Liberty made material misrepresentations." (7)</p>	<p>"The Bureau thus believes that the Presiding Judge was within his authority to determine that Liberty's behavior ... showed a lack of candor and an intent to conceal the unauthorized activations." (12);</p> <p>"Liberty demonstrated lack of candor ... by making false statements in support of its license applications." (21)</p>		

(Testimony Closed)

(Record Closed)

RICHTER LETTER

5/29/97

11/10/97

Bureau's Comments on Liberty's Opposition to Motion for Inquiry	Bureau's Proposed Findings of Facts and Conclusions of Law	Bureau's Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law of Time Warner and Liberty	Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony	Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report	Bureau's Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law	Bureau's Consolidated Reply
Feb. 21, 1997	Feb. 28, 1997	March 10, 1997	June 11, 1997	June 23, 1997	Nov. 19, 1997	Dec. 2, 1997	April 22, 1998
			<p>"[Ms. Richter] did not, however, have any concern that unauthorized activations had already occurred, only that there existed the potential of a future activation." (5);</p> <p>"[T]he Richter Letter did not inform Liberty that it was operating microwave paths without a license. Nothing in the letter specifically states that Liberty is doing anything illegal." (8-9);</p> <p>"[T]he Richter Letter did not make anyone aware of premature service by Liberty. Ms. Richter was clear that she was only concerned that the potential existed for paths to be operated without authorization and not that it had already occurred." (12)</p>	<p>"Time Warner argues that the Richter letter put Liberty on notice that Mr. Nourain did not understand the Commission's Rules. Although from a reading today of the Richter Letter, that appears to be a reasonable inference, the letter did not in fact put Liberty on such notice when it was received by Liberty personnel." (6);</p> <p>"Although at first blush, Mr. Price's testimony that he did not see the Richter Letter as any type of warning to Liberty is not credible; however, it is entirely consistent with the remainder of the evidence." (6);</p> <p>"[I]t is clear that Mr. Price did not read into the Richter Letter what hindsight will allow all of us to read into it today." (7)</p>	<p>"The record evidence further established that at the time she drafted the letter, Ms. Richter did not have any concern that unauthorized activations had already occurred." (7);</p> <p>"[T]he Audit report's cryptic reference -- that a Pepper and Corazzini attorney 'appears to have become aware' that premature activation occurred -- does not contradict any material issue of fact established previously in this proceeding. Even assuming <i>arguendo</i> that this statement were true, the Audit Report makes clear that 'P&C ... never communicated this fact [about the premature activations] to any Liberty officer.'" (13)</p>		<p>"Liberty also disputes that the Richter letter ...[was a] clear warning[] or readily available data which made Liberty aware of its premature activations. The Bureau disagrees." (14-15);</p> <p>"[T]he Presiding Judge justifiably found it was unreasonable for Mr. Price to 'have missed the cautionary message that Richter was providing.'" (15)</p>

(Testimony Closed)

(Record Closed)

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 1998, I caused copies of the foregoing

"Motion to Strike" to be delivered by hand to the following:

Commissioner William E. Kennard
Ari Fitzgerald, Esq.
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner Susan Ness
David Sidall, Esq.
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Harold Furchgott-Roth
Paul Misener, Esq.
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Michael Powell
Peter Tenhula, Esq.
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Gloria Tristani
Karen Gulick, Esq.
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

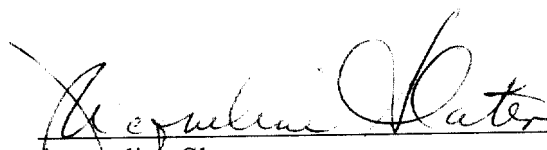
Daniel B. Python, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Kathleen O'Brien-Ham, Esq.
Catherine Seidel, Esq.
Howard Davenport, Esq.
Katherine C. Power, Esq.
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

Christopher Wright, Esq.
David Solomon, Esq.
John Riffer, Esq.
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

R. Bruce Beckner, Esq.
Fleischman & Walsh, L.L.P.
1400 Sixteenth Street, N.W., Suite 600
Washington, D.C. 20036

Christopher A. Holt, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
701 Pennsylvania Ave., N.W., Suite 900
Washington, D.C. 20004



Jacqueline Slater